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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

XILING CHEN,

Plaintiff,

v.

MICHAEL MUKASEY, Attorney General of
 the United States; MICHAEL CHERTOFF,
 Secretary of the Department of Homeland
 Security; EMILIO GONZALES, Director of
 United States Citizenship & Immigration
 Services; ROBERT MUELLER, Director of the
 Federal Bureau of Investigations; GERARD
 HEINAUER, Director of the Nebraska Service
 Center,

Defendants.

No. C 07-4698 PVT

DEFENDANTS' CROSS-OPPOSITION TO
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGMENT

Plaintiff Xiling Chen asks this Court to issue a writ of mandamus, compelling the Defendants to make a determination on her application for adjustment of status.

Defendants Mukasey and Mueller should be dismissed as improper defendants. *See Wang v. Gonzalez*, 2007 WL 4463009, *3 (N.D.Cal. Dec. 17, 2007) (stayed).

Plaintiff argues that although the government may use unlimited discretion when granting or denying an application, there is nothing discretionary about the government's duty to adjudicate an adjustment of status application within a reasonable time frame.

There is no Ninth Circuit authority addressing this issue. However, this Court recently

Defendants' Cross-Opposition to Motion for Summary Judgment
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1 addressed the TRAC factors in *Wang Yi Chao v. Gonzales*, 2007 WL 3022548 (N.D. Cal. Oct. 15,
2 2007) and articulated a standard in agreement with the holdings of other courts within the district
3 that a delay of two years is presumptively unreasonable as a matter of law. *See, e.g., Dong v.*
4 *Chertoff*, 2007 WL 2601107 (N.D.Cal. Sept.6, 2007) (holding delay of close to two years
5 unreasonable as a matter of law); *Clayton v. Chertoff*, 2007 WL 2904049 at *6 (N.D.Cal. Oct.1,
6 2007) (recognizing that courts within the district have adopted two years as an unreasonable
7 amount of time and that under two years is not unreasonable.)

8 Plaintiff's application has been pending since January 2005, when she became eligible due to
9 her husband's status. While this is more than two years, "[w]hat constitutes an unreasonable delay
10 in the context of immigration applications depends to a great extent on the facts of the particular
11 case." *Gelfer v. Chertoff*, 2007 WL 902382 at *2 (N.D.Cal. Mar. 22, 2007). It is Defendants'
12 position that they have successfully challenged the Court's subject matter jurisdiction or, in the
13 alternative, demonstrated that the delay here has been reasonable. Defendants provided the
14 declaration of Mark A. Rohrs, the Assistant Center Director at the Nebraska Service Center for
15 USCIS, who is familiar with the procedures followed by the USCIS when an alien applies for an
16 adjustment of status, and has review Plaintiff's application.

17 Rohrs attests that in January 2005, Plaintiff's husband's application for adjustment of status
18 was approved, the basis for her own application. Rohrs Decl., ¶ 13. Plaintiff's application is still
19 pending, because the background checks are incomplete and ongoing. *Id.*, ¶ 25. Rohrs explains
20 that since the terrorist attacks on September 11, 2001, there is a need to conduct more rigorous
21 background checks of those who are seeking immigration status. *Id.* ¶¶ 9-11. Because this process
22 is more thorough, it sometimes results in the delay of requested documentation and immigration
23 benefits. *Id.* Rohrs also explains that adverse effect that requesting expedites in the bloom of
24 district court litigation. *Id.* ¶ 21-22. USCIS is processing Plaintiff's application in accordance
25 with the resources allocated and the systems in place. *Id.* ¶ 25.

26 Defendants have provided sufficient evidence to demonstrate that any delay in adjudicating
27 Plaintiff's adjustment of status application is not due to agency inaction, but rather to the time
28 required to resolve all concerns of a law enforcement or national security nature. Accordingly, the

1 Court should find that the USCIS is properly adjudicating Plaintiff's application while
2 counterbalancing the delays in the background check process that the FBI must complete. *See*
3 *Sayyadinejad v. Chertoff*, 2007 WL 4410356 (S.D.Cal. Dec. 14, 2007).

4 It remains Defendants 's position that the statutory language clearly grants the USCIS
5 discretion to adjust an alien's status and the statute is silent as to a time limit by which the USCIS
6 must adjudicate. Thus, the APA does not provide jurisdiction because the pre-adjudication process
7 is committed to agency discretion and § 1252(a)(2)(B) precludes the Court from compelling the
8 USCIS to make such a decision.

9 In any event, this Court needn't determine whether it has jurisdiction under the APA, because
10 in this case, Plaintiff's application has been delayed for a legitimate reason. The adjudication
11 process has taken three years because of the delay of the FBI background checks. USCIS and FBI
12 are taking reasonable precautions as public safety requires them to do, and are also doing
13 everything possible to ensure that the Plaintiff waits no longer than necessary to receive permanent
14 status. Accordingly, the APA does not grant the Court subject matter jurisdiction in this case.

15 In this case, Plaintiff seeks agency action. Specifically, she seeks an order directing the USCIS
16 adjudicate an adjustment of status application. The declaration of Rohrs has revealed that the
17 delay is reasonable and that the USCIS and FBI are working within certain restraints to complete
18 the adjudication of the application. These types of claims are common, and the Court should find
19 the circumstances of Plaintiff's claim are not drastic enough to warrant the use of the All Writs
20 Act.

21 For the foregoing reasons, the Government respectfully asks the Court to dismiss Defendants
22 Michael Mukasey and Robert Mueller and grant the remaining Defendants' motion for summary
23 judgment as a matter of law.

24 Dated: February 4, 2008

Respectfully submitted,

25 JOSEPH P. RUSSONIELLO
26 United States Attorney

27 /s/
ILA C. DEISS
28 Assistant United States Attorney
Attorneys for Defendants